IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 8, 2007 Session

DAVID LEE WRIGHT, as parent and next friend of KAITYLN LEE WRIGHT, a minor,

v.

ANITA J. WRIGHT and ELLEN COLLINS, ADMINISTRATRIX OF THE ESTATE OF MARJORIE COPLEY,

Appeal from the Circuit Court for Fentress County
No. 8136 John McAfee, Judge

No. M2007-00378-COA-R3-CV - Filed December 12, 2007

This appeal concerns the amount of attorney's fees awarded to counsel for a minor in a suit arising out of an accident which resulted in substantial injuries to the minor child. The only issue on appeal is the amount of attorney's fees set by the trial court. For the reasons stated herein we reverse the trial court and remand for a hearing in which it shall determine anew the appropriate amount of attorney's fees consistent with RPC 1.5(a) and the principles set forth in this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded.

WALTER C. KURTZ, SP. J., delivered the opinion of the Court, in which PATRICIA J. COTTRELL, P.J., M.S., and DONALD P. HARRIS, SR. J., joined.

James P. Romer, Jamestown, Tennessee, for the appellant Kaitlyn Lee Wright in his capacity as guardian ad litem.

Johnny V. Dunaway, LaFollette, Tennessee, for the appellee David Lee Wright, parent and next friend of Kaitlyn Lee Wright, a minor.

OPINION

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Before the Court is a guardian ad litem's challenge, on behalf of his minor client, to the amount of attorney's fees awarded ($141,666.66) after the minor's lawsuit was settled for $425,000.00. The Court will set forth what it considers to be the salient facts related to the question at issue in this appeal: the reasonableness of the attorney's fees awarded to counsel for the plaintiff.

On May 12, 2005, Kaitlyn Lee Wright ("Kaitlyn"), a nine-year-old girl, was seriously injured in an automobile accident. Her grandmother, Marjorie Wright Copley, was killed in the same crash, which occurred while she was driving her granddaughter home from school. Kaitlyn's parents are divorced. Her father, David Lee Wright, filed a complaint as her next friend in the Fentress County Circuit Court on June 10, 2005. He named as defendants Anita J. Wright, the driver of the other vehicle involved in the accident, and Ellen Collins, the administratrix of the estate of Marjorie Copley.[1] Kaitlyn's mother, Tracy Nivens, filed an identical action on June 23, 2005 also in the Fentress County Circuit Court.[2] Ultimately, after some skirmishing, this second and collateral lawsuit was dismissed by the court below. During these proceedings the trial court appointed James Romer as Kaitlyn's guardian ad litem. It was of the opinion that appointment of a guardian ad litem was necessary because of concern that there were "competing parents."

On July 24, 2006, pursuant to Tennessee Supreme Court Rule 31, the parties attended a judicial settlement conference presided over by another judge. At the settlement conference, the parties agreed to dismiss Anita J. Wright as a defendant, and the estate of Marjorie Copley agreed to pay $425,000.00 to settle Kaitlyn's claims. Since the case involved a minor, its settlement required approval by the trial court.

By caselaw and by statute the settlement of a case brought by a minor for personal injuries must be approved by the court, and the court must ensure that the settlement itself is in the best interests of the minor. *See Busby v. Massey*, 686 S.W.2d 60 (Tenn. 1984); *Rafferty v. Rainey*, 292 F.Supp. 152 (E.D. Tenn. 1968); *see also* T.C.A. § 29-34-105; T.C.A. § 34-1-121(b). Obviously, part of settling a minor's personal injury claim is authorization to pay attorney's fees, and a determination of the proper amount of attorney's fees for handling a minor's claim must be made by the court. *See Roberts v. Vaughn*, 142 Tenn. 361, 368, 219 S.W. 1034, 1036 (1920) (holding that attorney's fees for representing a minor are subject to the "action of the Court in fixing his compensation" only

---

[1] The record does not indicate whether Kaitlyn and her father are related to Ms. Anita Wright.

[2] This case was styled *Kaitlyn Lee Wright, a minor child, by her next friend, Tracy R. Nivens, her mother and natural guardian v. Ellen Wright Collins, Administratrix of the Estate of Marjorie Wright Copley, deceased* (Case No. 8137).

"after an investigation of their value"); *see generally* 42 Am. Jur. 2d *Infants* § 200 (2000).

Notice was sent to the parties in this case that counsel for the plaintiff (Mr. Dunaway) would appear to obtain judicial approval of the minor's proposed settlement, which included an attorney's fee of $141,666.66. The guardian ad litem responded to this motion and notice of hearing by a pleading filed September 15, 2006. This pleading objected to the amount of the requested fee.

The trial court held a hearing on September 25, 2006, but this proceeding was remarkably lacking in proof related to the question of attorney's fees. The court first heard the lawyers' comments regarding the settlement amount, which was found to be fair and reasonable. The guardian ad litem then broached the issue of attorney's fees. There was no affidavit from counsel for the plaintiff as to his time, and, even though there was much discussion of a contingent fee agreement between him and the plaintiff's father, no written agreement was ever entered into evidence.[3] The guardian ad litem pointed out that the attorney's fees to be awarded could not be controlled by a contingency agreement between the father and the lawyer but rather should be governed by a "reasonableness standard." He cited the trial court to *Shoughrue v. St. Mary's Medical Center, Inc.,* 152 S.W.3d 577 (Tenn. Ct. App. 2004), and the factors contained in Rule 1.5(a) of the Rules of Professional Conduct. There was a lengthy colloquy between the court and the guardian ad litem, and finally counsel for the plaintiff made a statement asserting that he was entitled to the "contractual fees." The transcript shows the following:

> THE COURT: The Court has considered the factors listed in Rule 1.5 in reference to what's been presented to the Court by the guardian. The Court has also reviewed the *St. Mary's* case. Is it *Shoughrue*?
>
> MR. ROMER: Yes, Your Honor.
>
> THE COURT: And again, I think this case is sort of a fundamental issue for the Court . . . does the Court reach down and start to intervene to the point to where I think my judgment is superior to yours or to Mr. Dunaway's or to any litigant that enters into these contracts[?] Apparently, the proposition of this case that's been presented to the Court is that parents cannot contract contingency fees, I guess, in these type of suits involving a child or a minor. I guess the question I would have to the Court is who can. I don't know. I mean, apparently the Court of Appeals left that unanswered. But taking everything into consideration, the Court doesn't find that this fee is unreasonable in any way. Again, I posed the question a moment ago, let's suppose that a nine year old was capable, legally could have contracted with an attorney more than likely that lawyer would have charged a third. And just because – and I guess the difference I see in this is that some judges, I suspect, would say, oh, it's a minor. And it is a minor. We're very sympathetic and glad the child is doing

[3] Rule 1.5(c) of the Rules of Professional Conduct requires that contingent fee agreements be reduced to writing.

well.

> I don't – I want to be careful what I say, but I just think that, at least from my perspective, and I've been accused of being conservative in a lot of ways[.] I don't know whether I am or not, but I fully and firmly support the free market approach in any aspect. And I have no intentions of interfering with this. I don't think that it raises [*sic*] to the level as to this million dollar fee that was cited in the *St. Mary's* case. However, the courts have got to be very careful, I think, in entertaining these issues because we create all kinds of issues later down the road. Apparently, we'd create an issue in this case doing something of that nature. Anything else that we need to say?
>
> MR. DUNAWAY: No, Your Honor.
>
> THE COURT: Thank you all so much.

There were several subsequent orders entered which made reference to the approved attorney's fees. The definitive order, however, is that entered November 9, 2006, which states in relevant part:

> This cause came for consideration on the 25th day of September, 2006, before the Honorable John McAfee, Judge of the Circuit Court for Fentress County, Tennessee, sitting at Jacksboro, upon the reply to the motion filed by the Guardian Ad Litem to review the reasonableness of the attorney's fees charged by plaintiff's counsel in this minor's settlement. After entertaining the arguments of counsel, reviewing the law, and the exhibits filed by the Guardian Ad Litem, the Court is of the opinion that the contingent fee charged in this case of $141,666.66 on a total recovery of $425,000.00 is a fair and reasonable fee.[4]
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, as follows:
> 1. That the contractual fee of Attorney, Johnny V. Dunaway, is approved and shall be paid from the settlement proceeds.

A final order was entered on January 9, 2007 pursuant to Tennessee Rule of Civil Procedure 54.02, and this appeal ensued as to the amount of those attorney's fees.

---

[4] As near as this Court can determine the exhibits referenced are simply an exchange of letters between the guardian ad litem and counsel for the plaintiff which were attached to the response of the guardian ad litem. The guardian ad litem requested that he be allowed "to review the contract between you and your client [i.e., the father] and review the details of the expenses and the subrogation workout." The return letter stated that the fee was simply a matter of contract and that "the issue you have raised is outside the scope of your duties as guardian ad litem."

The sole issue for this Court is whether the trial court erred in approving an attorney's fee of $141,666.66 in a personal injury case which involved serious injuries to a minor child and which settled for $425,000.00 by finding the fee to be reasonable on the basis of a contingency fee agreement with the minor's parent.

II. STANDARD OF REVIEW

The determination of whether an attorney's fee is reasonable is normally within the trial court's discretion. *McNeil v. Nofal*, 185 S.W.3d 402, 412 (Tenn. Ct. App. 2005); *Killingsworth v. Ted Russell Ford, Inc.,* 104 S.W.3d 530, 534 (Tenn. Ct. App. 2002). Discretionary decisions must, however, be based upon the applicable law and the relevant facts. *See, e.g., Ballard v. Harzke*, 924 S.W.2d 652, 661 (Tenn. 1996). A trial court will be found to have abused its discretion only when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *See Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001); *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 708-09 (Tenn. Ct. App. 1999).

III. DISCUSSION

A. ROLE OF THE GUARDIAN AD LITEM

Although not specifically raised on appeal, counsel for the plaintiff has at one time contended that the issue of attorney's fees was beyond the duties of the guardian ad litem. This Court wishes to make clear that a challenge to attorney's fees is well within the duties of a guardian ad litem. The role of a guardian ad litem is to protect a minor's interests. *Toms v. Toms*, 209 S.W.3d 76, 81 (Tenn. Ct. App. 2005); *Keisling v. Keisling*, 196 S.W.3d 703, 729-30 (Tenn. Ct. App. 2005); *see also* Tenn. R. Civ. P. 17.03. Specifically, the role of a minor's guardian ad litem in the context of settling of a serious tort claim is illustrated by *Thomas v. R.W. Harmon, Inc.*, 760 S.W.2d 212 (Tenn. Ct. App. 1988). *Thomas* involved a collateral challenge to a minor's settlement entered into by the child's parent without the aid of counsel. *See id.* at 213. The minor was seriously injured, but the parent settled for a small amount. *Id.* This Court held that the trial court's failure to appoint a guardian ad litem, investigate into the facts of the incident, or determine whether the settlement was in the minor's best interests supported setting aside the judgment. *Id*. at 217.

The Court does not suggest that *Thomas* is factually the same as this case, but *Thomas* does illustrate that the guardian ad litem is obliged to bring to the trial court's attention all facts bearing upon the fairness of the settlement, and this necessarily includes examination of the amount of attorney's fees to be awarded. It is obvious that the higher the fee for the attorney, the less there is available for the minor.

> In a settlement proceeding, the guardian ad litem has the duty to conduct a thorough investigation and evaluate the damages suffered by the minor and the adequacy of the settlement, including the amount of attorney fees charged by the minor's attorney.

42 Am. Jur. 2d *Infants* § 188 (2000); *see Enochs v. Brown*, 872 S.W.2d 312, 317 (Tex. App. 1994) (stating that a guardian ad litem has standing to challenge the validity of a fee contract on a minor client's behalf).

The guardian ad litem here acted appropriately by raising the issue of attorney's fees with the trial court. This Court recognizes that it is often awkward for one attorney to challenge the fees awarded to another. The Court, therefore, wishes to commend the guardian ad litem for his dedication to the interests of his minor client and his adherence to his professional obligation.

B. ATTORNEY'S FEES IN MINORS' TORT CASES

It appears that the attorney who prosecuted this tort claim entered into a contingent fee agreement with the father of the minor plaintiff, and this agreement apparently provided that counsel would receive one-third of the recovery.[5] As previously mentioned, the purported fee agreement was never made an exhibit.

It has long been the law in Tennessee that a next friend (including a parent) cannot make a contract with counsel which would bind the minor with respect to the amount of attorney's fees. *City of Nashville v. Williams*, 169 Tenn. 38, 82 S.W.2d 541 (1935); *Roberts*, 142 Tenn. at 368, 219 S.W. at 1035. This rule was recently reiterated in a case in which a lawyer sought a percentage under a contingent fee agreement with a father for representation of a minor in a malpractice action. This Court explained:

> We further note that it is well established under the law in Tennessee that a next friend cannot contract with counsel for the amount of their fees so as to bind the minor. Where an attorney confers a benefit upon a minor child he is entitled to the reasonable value of his services from the amount recovered; however, it is left to the court to determine what that value is under the circumstances presented. Accordingly, regardless of the fact that [the minor's parents] agreed that [the attorney] would receive thirty-three and one-third of the total recovery in this case, he is only entitled to that fee which the Trial Court determines to be reasonable.

Shoughrue v. St. Mary's Med. Ctr., 152 S.W.3d 577, 585 (Tenn. Ct. App. 2004) (internal citations omitted).

The factors to be considered in setting attorney's fees are those contained in Rule of Professional Conduct 1.5(a):

---

[5] This opinion focuses exclusively on the relationship between a minor and the minor's attorney in a personal injury case. This opinion does not address a contingent fee agreement between an adult and his attorney as that agreement remains governed by RPC 1.5(c), contract law, and, in medical malpractice cases, T.C.A. § 29-26-120. *See generally Alexander v. Inman*, 903 S.W.2d 686, 695-97 (Tenn. Ct. App. 1995) (discussing contingent fee agreements).

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) The fee customarily charged in the locality for similar services;
(4) The amount involved and the results obtained;
(5) The time limitations imposed by the client or by the circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) Whether the fee is fixed or contingent.

See, e.g., Connors v. Conners, 594 S.W.2d 672, 676 (Tenn. 1980); *Shoughrue,* 152 S.W.3d at 584-86; *see also Killingsworth*, 104 S.W.3d at 534.

Given the law cited above, the lawyer retained by the father in this case to represent his child was on notice that his agreement was not binding on the minor. The contingent nature of the fee may be considered, but only as one of the eight factors listed above. It is acknowledged that "an attorney's fee should be greater where it is contingent than where it is fixed." *United Med. Corp. v. Hohenwald Bank & Trust Co.*, 703 S.W.2d 133, 136 (Tenn. 1986). However, again, the contingent fee agreement with the father is only one of the RPC 1.5(a) factors.

> The fact that an attorney's employment is undertaken on a contingent basis is a proper factor to be considered in assessing a reasonable compensation for his or her services; a larger fee will be authorized when its payment depends on the attorney's success than where the attorney is paid regardless of success. If, however, there is little hazard involved in the litigation, the fact that a retainer is on a contingent fee basis may be entitled to little weight.

7 Am. Jur. 2d *Attorneys at Law* § 299 (2007) (formerly § 321).

C. BURDEN OF PROOF

One seeking attorney's fees has the burden of proving what constitutes a reasonable fee and should be in a position to tender the necessary proof. *Wilson Mgmt. Co. v. Star Distribs. Co.*, 745 S.W.2d 870, 873 (Tenn. 1988). As Justice (then Judge) Koch has explained for this Court:

> [The party seeking attorney's fees] has the burden to make out a prima facie claim for his request for reasonable attorney's fees. Ordinarily, the party requesting attorney's fees carries this burden by presenting the affidavit of the lawyer who performed the work. Parties opposing a request for attorney's fees should be afforded a fair opportunity to cross-examine the requesting party's lawyer or to present proof of its own.

Hosier v. Crye-Leike Commercial, Inc., 2001 WL 799740, at *6 (Tenn. Ct. App. July 17, 2001) (internal citations omitted).

Of course, a court is able to rely upon its own knowledge of the case and also on its general knowledge of fees for legal services. *Wilson Mgmt.*, 745 S.W.2d at 873; *Hosier*, 2001 WL 799740, at *7. This knowledge, however, cannot relieve the party seeking attorney's fees of its burden of proof, nor can it relieve the trial court of its obligation to separately consider all of the RPC 1.5(a) factors.

> The reasonableness of requested attorney's fees depends on the facts of each case, not on the prevailing customs in the area. Reasonableness determinations should be guided by the factors in Tenn. S.Ct. R. 8, DR 2-106(B) [now RPC 1.5(a)]. The time expended and the hourly rate charged are only two of the many factors influencing the reasonableness of a particular fee. Other factors include the nature of the services rendered, the novelty and difficulty of the issues involved, the skill required to perform the services properly, the results obtained, and the experience, skill, and reputation of the attorney performing the services.

Hosier, 2001 WL 799740, at *8 (internal citations omitted).

IV. ARGUMENT ON THIS FACTUAL RECORD

Both sides have attempted to argue the validity of their positions on the meager record available in this case. Both, however, also acknowledge that there was no proof admitted at the September 25, 2006 hearing and that the trial court made no findings referencing the specific relevant factors embodied in RPC 1.5(a).

The guardian ad litem argues that, before settling this case at the judicial settlement conference, counsel for the plaintiff made only a few court appearances, took no depositions, and could have spent "no more than 100 hours [even] by the most liberal estimates." Furthermore, he argues that liability was clear from the start of the case. In contrast, counsel for the plaintiff contends that the minor child here sustained serious injuries, which thus necessitated his obtaining extensive medical records. He also states that he had to propound interrogatories, locate assets, negotiate a significant subrogation interest, and prepare and participate in the settlement conference. Additionally, he notes that he had to deal with the competing suit filed by Kaitlyn's mother. Counsel for the plaintiff asserts that the trial court knew all or most of this when his attorney's fees were set.

Some of the above is speculative, and whatever the trial court may have known it did not clearly indicate at the September 25, 2006 hearing. The most striking void in the record is the lack

of any precise information as to the amount of time spent on the case by counsel for the plaintiff.[6] Furthermore, counsel for the plaintiff, who bore the burden of proving the reasonableness of his fee, addressed none of the RPC 1.5(a) factors other than to give the trial court a brief chronology of the case; he nonetheless concluded by saying, "[W]e're all fortunate that the case is settled[,] but counsel's entitled to the contractual fees in this case." The trial court in turn stated that it "considered the factors listed in Rule 1.5 in reference to what's been presented to the Court by the guardian" but then went on to say that it had "no intention[] of interfering with this [contingent fee agreement]."

V. DECISION

Both counsel for the plaintiff and the trial court seem to have believed that the contingent fee agreement trumped all the other relevant factors set out in RPC 1.5(a). We disagree. The hearing held on September 25, 2006 was devoid of proof as to the time devoted to the case by counsel, there were no findings as to the specifically articulated criteria, and there was no recognition that the burden was on counsel for the plaintiff to show the reasonableness of his request. While a trial court may rely to some extent on its knowledge of the case and also on its own general knowledge of fee schedules in an area, it cannot allow this information to overwhelm its obligation to consider all relevant factors. *See* RPC 1.5(a). The decision below on attorney's fees is therefore reversed.

This case is remanded to the trial court for a full hearing wherein counsel for the plaintiff shall have the burden of proving the amount of a reasonable fee, and all appropriate factors in RPC 1.5(a) shall be considered. In the process of determining the reasonable fee to be awarded, the trial court shall make findings with respect to those factors.

WALTER C. KURTZ, SPECIAL JUDGE

[6] Courts and commentators have observed that time records – time spent on the case – are "central" to the calculation of attorney's fees. *See Donnarumma v. Barracuda Tanker Corp.*, 79 F.R.D. 455, 465-66 (C.D. Cal. 1978) (attorney's fees determination in minor settlement of tort claims); 42 Am. Jur. 2d *Infants* § 200 (2000); *see also Deja Marie J v. San Francisco Unified Sch. Dist.*, 2006 WL 2348884, at *3 (N.D. Cal. Aug, 11, 2006) (settling a minor's claim requires the court to consider all appropriate factors including the "number of hours that can be reasonably attributed to prosecuting this case on the minor's behalf and the reasonable rate such services entail"); *cf.* 7 Am. Jur. 2d *Attorneys at Law* § 288 (2007) (formerly § 309) (time spent is one of the more important elements to be considered by a court in fixing reasonable attorney's fees).